No. 03-1086

Supreme Court, U.S.
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In The
Supreme Court of the United States

SHR LIMITED PARTNERSHIP,
a West Virginia limited partnership,

Petitioner,

v.

MERCURY EXPLORATION CO., a Texas corporation
and
DOMINION RESERVES, INC., a Michigan corporation
and
QUICKSILVER RESOURCES, INC.,
a Delaware corporation,

Respondents.

On Petition For Writ Of Certiorari To The Michigan Court Of Appeals

OPPOSITION OF MERCURY EXPLORATION CO., DOMINION RESERVES, INC., and QUICKSILVER RESOURCES, INC. TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. WHEN THE MICHIGAN COURT OF APPEALS CONCLUDED THAT THE PARTIES' PRECEDESSORS HAD ALREADY LITIGATED THE ISSUES INVOLVED, AND THUS AFFIRMED THE DISMISSAL OF THE CASE BASED ON THE DOCTRINE OF *RES JUDICATA*, DID THE COURT DEPRIVE PETITIONER OF SOME CONSTITUTIONAL RIGHT?

II. WHERE PETITIONER ACKNOWLDGED THAT THE PARTIES' PREDECESSORS IN INTEREST HAD PREVIOUSLY LITIGATED CASES INVOLVING THE SAME ISSUES AS IN THE PRESENT CASE, WAS PETITONER WITHOUT NOTICE THAT IT MAY HAVE TO ADDRESS ISSUES OF *RES JUDICATA*?

CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, respondents make the following Disclosures:

(1) Quicksilver Resources, Inc. has no parent corporation, nor does any publicly held company hold more than 10% of the stock of Quicksilver Resources, Inc.

(2) The direct parent of Dominion Reserves, Inc., is Dominion Energy, Inc. The parent of Dominion Energy, Inc. is Dominion Resources, Inc. No publicly held company holds more than 10% of the stock of Dominion Reserves, Inc.

(3) The parent company of Mercury Exploration Co. is Mercury Production Company, a Texas corporation. Neither Mercury Exploration Co. nor Mercury Production Company are publicly traded. No publicly held corporation owns more than 10% of the stock of Mercury Exploration Co.

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RESPONSE OF MERCURY EXPLORATION CO., DOMINION RESERVES, INC., AND QUICKSILVER RESOURCES, INC. TO PETITION FOR WRIT OF CERTIORARI

Pursuant to United States Supreme Court Rule 15, Respondents Mercury Exploration Co., Dominion Reserves, Inc., and Quicksilver Resources, Inc. (Respondents) hereby submit this brief in opposition to the Petition for a Writ of Certiorari.

I. COUNTER-STATEMENT OF THE CASE

As reflected in its Petition for Certiorari (Petition), Petitioner SHR Limited Partnership (Petitioner) appealed an order of the Otsego (Michigan) Circuit Court denying its motion for summary disposition and granting Respondents' motion for summary disposition. In an order dated December 6, 2002, the Michigan Court of Appeals correctly affirmed the circuit court order. The Michigan Court of Appeals affirmed the circuit court on the ground that an order issued by Crawford (Michigan) Circuit Judge Porter in a prior litigation barred Petitioner from relitigating the same claim (Petition Appendix A). Other grounds also existed to affirm the circuit court's decision, which other grounds the Michigan Court of Appeals did not address in light of its reliance on principles of *res judicata*.

Following the issuance of the Michigan Court of Appeals' Order, Petitioner, on December 20, 2002, filed a Motion for Rehearing in the Michigan Court of Appeals, asserting that a settlement agreement between the parties' predecessors "nullified" the Crawford Circuit Court order on which the Michigan Court of Appeals had relied in applying *res judicata* (Plaintiff-Appellant's Brief on

Appeal to the Michigan Court of Appeals, p. 23). The court denied Petitioner's motion in an order dated January 16, 2003. Thereafter, Petitioner filed an Application for Leave to Appeal to the Michigan Supreme Court, which the court denied in an order dated July 28, 2003 (Petition Appendix C). Petitioner filed for reconsideration of the denial, which Michigan Supreme Court denied on October 31, 2003 (Petition Appendix D).

Thus, all the courts below denied Petitioner any relief. Nevertheless, Petitioner now seeks a writ of certiorari from this Court on the theory that the Michigan Court of Appeals, in applying the doctrine of *res judicata*, somehow violated its constitutional right of due process and equal protection. As fully explained below, the Petition falls far short of providing any "compelling reasons," in accordance with Supreme Court Rule 10, for this Court to exercise its discretionary review. The Petition fails to set forth even rudimentary claims for a violation of the Due Process and Equal Protection Clauses. Therefore, this Court should deny certiorari.

The Petition provides scant or misleading information about how and why the controversy arose, and Respondents dispute critical facts contained in the Petition and set forth as follows:

1. The Michigan Court of Appeals never stated that the trial court's reasoning was wrong (Petition, p. 2). The court stated that, "[t]hough the trial court gave a different explanation for its decision, our conclusion merely provides an alternative ground for affirming" (Petition Appendix, p. 4a).

2. Respondents did not begin deducting post-production costs from Petitioner's royalty interests "in contravention of the settlement agreement" (Petition, p. 4). The parties' predecessors entered a settlement agreement in 1985 after Crawford Circuit Judge Porter decided in favor of Respondents' predecessor. Both parties to this case later acquired their respective interests under the disputed leases as a result of various assignments. Respondents did not become aware of the settlement agreement until after the Petitioner commenced the instant litigation. The settlement agreement was never recorded with the register of deeds, and so subsequent interest holders were never apprized of its existence. Accordingly, Respondents deducted post-production costs in accordance with Judge Porter's order and in accordance with the terms of the oil and gas lease.

3. Petitioner's description of the 1985 settlement agreement is misleading. The 1985 settlement agreement actually supports Respondents' treatment of post-production costs, and was largely consistent with Judge Porter's order.

4. Petitioner brought the 1983 Litigation to the attention of the Michigan Court of Appeals. *See* Plaintiff-Appellant's Brief on Appeal to the Michigan Court of Appeals, p. 22. Thus, the issue of *res judicata* was properly before the Michigan Court of Appeals, because the Petitioner itself brought the prior litigation to the court's attention.

5. After extensive questioning of Petitioner's counsel on the issue of *res judicata*, the

Michigan Court of Appeals rejected Petitioner's positions, and reached the conclusion that Judge Porter's Order barred Petitioner from relitigating the same claim.

6. The Michigan Court of Appeals in the previous litigation did not enter a consent judgment, nor did the court vacate Judge Porter's Order. In the previous litigation, the court did not review or approve the settlement agreement in any manner. *See* Petition Appendix, pp. 16a-17a.

7. The Michigan Court of Appeals order dismissing the appeal of the 1983 Litigation is not a judgment (Petition, p. 11). The clerk of court, rather than a judge, signed the order. Further, the order of dismissal did not mention the settlement agreement; it merely acknowledged the existence of a stipulation agreeing to the dismissal of the appeal, and then dismissed the appeal with prejudice and without costs.

II. ARGUMENT

A. The Michigan Court of Appeals Properly Affirmed the Trial Court's Grant of Summary Disposition in Respondents' Favor.

Petitioner characterizes the Michigan Court of Appeals' application of *res judicata* as a "vicious abrogation" of its constitutional rights of due process and equal protection (Petition, p. 8). Petitioner argues that the Michigan Court of Appeals erred in applying the doctrine of *res judicata*.

Petitioner correctly notes that a state court's application of *res judicata* may not be so extreme as to be inconsistent with the Federal Constitution. *See Postal Tele graph Cable Co. v. Newport*, 247 U.S. 464, 476, 38 S. Ct. 566, 570-71, 62 L. Ed. 1215 (1918). However, nothing in Court of Appeals' orders supports the position that the court applied *res judicata* in an "extreme" or "vicious" manner, or that it was inconsistent with the United States Constitution. The court found that in the 1983 Litigation, (consisting of the consolidated cases of *North Michigan Land & Oil Corp. v. Shell Oil Co.*, Crawford County, Michigan Circuit Court Case No. 80-004-292CA and *Nelson v. Shell Oil Co.*, Crawford County, Michigan Circuit Court Case No. 80-004-294), Petitioner and Respondents' predecessors in interest already litigated the over-arching issue in this case – whether post-production costs were deductible from royalties under the terms of the lease agreement. The trial court in the 1983 Litigation decided this issue on the merits, and the trial court's decision was final. *See* Petition Appendix, pp. 2a-4a.

Petitioner claims that Judge Porter's Order was not a final order. Alternatively, Petitioner claims that Judge Porter's Order should be deemed vacated, because it was neither affirmed nor reversed by the Michigan Court of Appeals (Petition, p. 9). In so arguing, however, Petitioner has twisted simple facts to give the wrong impression that the Michigan Court of Appeals should have ignored the trial court's order in the previous litigation and given *res judicata* to its own clerical order dismissing the appeal of Judge Porter's prior ruling. Petitioner claims that, in the prior litigation, the Michigan Court of Appeals' order dismissing the 1983 Litigation was the final order/ judgment in the case (Petition, p. 11). In fact, however, the order dismissing the appeal by Petitioner's predecessor was not a court order; rather, it is an order by the clerk.

See Petition Appendix, p. 17a; MCR 7.218. Nor did the clerk's order, as Petitioner claims (p. 11), incorporate the settlement agreement. It merely acknowledged that the voluntary dismissal was entered because of the stipulation to dismissal pursuant to Michigan Court Rule 7.218(B).

In deciding Petitioner's appeal in the present case, the Michigan Court of Appeals correctly noted that the settlement agreement in the previous litigation was not a consent judgment (Petition Appendix, p. 3a, fn. 1). By arguing that the settlement agreement "implicitly vacated" Judge Porter's Order (Petition, p. 9), Petitioner is asking this Court to conclude that private parties' settlement agreements can retroactively vacate a trial court order. Petitioner provides absolutely no support for such a proposition, and its contention is simply not logical. The Michigan Court of Appeals' decision conforms to the well-settled law that a judgment has obtained finality after an appeal has been taken but dismissed. *See* 46 Am. Jur. 2d Judgment, § 585; 50 C.J.S. Judgment, § 640.

In fact, this Court has held that, when a party acquiesces to the dismissal of an appeal, the lower court judgment is binding and entitled to *res judicata* effect. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39, 71 S. Ct. 104, 106, 95 L. Ed. 36 (1950). In that case, this Court concluded that a prior judgment is conclusive against a party, even if the matter determined against him becomes moot:

> The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the

> right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, *so long as the judgment in the first suit remains unmodified.* [*Munsingwear, Inc.*, *supra*, 340 U.S. at 38 (emphasis added).]

In *Munsingwear*, *supra*, this Court rejected the United States' argument that "those who have been prevented from obtaining review to which they are entitled should not be treated as if there had been a review." *Id.* at 39. In *Munsingwear*, the United States government lost its case at the federal district court level, appealed, and later acquiesced in the dismissal of its appeal on the grounds of mootness, without seeking to vacate the adverse district court order. This Court held that *res judicata* barred the government from re-litigating the issue. *Id.* at 40.

The same result should obtain in this case. Petitioner's predecessor exercised its right of appeal, and then voluntarily reached a settlement agreement with Respondents' predecessor and withdrew the appeal without disturbing the lower court's order in any manner. Thus, the circuit court orders in the 1983 Litigation remain intact and unmodified, and the Michigan Court of Appeals properly barred Petitioner from re-litigating the claims.

Petitioner's public policy argument that the Michigan Court of Appeals' application of *res judicata* in the instant case will have "a disastrous effect on settlement" (Petition, p. 12) has no merit. This argument incorrectly assumes that, because of possible *res judicata* issues in the future, parties will be confused over whether they should settle. The law of Michigan and this Court is clear regarding the *res judicata* effect of settling a case after a court has ruled on the merits, and there is no reason to believe that

counsel for settling parties cannot take this law into account in fashioning their settlement.

This case falls squarely within the classic state of the rule of *res judicata* in *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48-49, 18 S. Ct. 18, 27, 42 L. Ed. 355 (1897) that "the right, question or fact once so determined must, as between the same parties, or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified." The Michigan Court of Appeals in the previous litigation did not review the settlement agreement, nor did it rule on the trial court's order. Nothing indicates that the trial court's order has been modified. The Petition simply provides no basis for this Court to devote its resources to revisit settled law. Certainly, no compelling issue of law has been raised.

B. The Petition Sets Forth Absolutely No Cognizable Claim for a Deprivation of Due Process or Equal Protection

Petitioner's second attack on the Michigan Court of Appeals is that the court applied *res judicata* in a *sua sponte* manner, and thus deprived Petitioner of the opportunity to be heard (Petition, p. 12). This contention likewise has no merit.

One of Petitioner's positions before the Michigan Court of Appeals was that the settlement agreement nullified Judge Porter's Order. The court rejected the argument because the settlement agreement was not a consent judgment, i.e, it was not signed by the circuit court (Petition Appendix, p. 3a, fn. 1). In light of the existence of the judgments in the 1983 Litigation, the

court found it "abundantly clear" that it needed to address the doctrine of *res judicata* (Petition Appendix, p. 3a).

Petitioner makes a glaring misstatement when it claims that

> *[R]es judicata* was first raised *sua sponte* by the Michigan Court of Appeals. No notice was given that petitioner would be called upon to defend against the assertion of *res judicata*. [Petition, p. 4.]

In fact, Petitioner raised the issue of *res judicata* first. In its Appellate Brief, Petitioner brought to the court's attention that the consolidated cases decided by Judge Porter involved its predecessor in interest. *See* Plaintiff-Appellant's Brief on Appeal to the Michigan Court of Appeals, p. 22. The trial court likewise acknowledged that this case was previously litigated by the parties' predecessors (Petition Appendix, p. 3a). Petitioner took the position that the settlement agreement reached by the predecessors "nullified" trial court's decision. *Id.* at 23. Thus, Petitioners attempt to create the impression that the court's ruling was a surprise is simply off base.

Petitioner asserts that the Michigan Court of Appeals erred in deciding the appeal as it did because, according to Petitioner, Respondents waived the right to raise the issue (Petition, p. 12). Petitioner then argues that the *sua sponte* interjection of the affirmative defense violated its constitutional rights to due process and equal protection (*Id.*). The doctrine of *res judicata* is a judge-made rule to relieve the Parties' of the cost and inconvenience of multiple suits, to conserve judicial resources, and to preserve the precedence of previous adjudications. *See Pierson Sand & Gravel, Inc. v. Keeler Brass Co.*, 460 Mich. 372, 380, 596 N.W.2d 153,

157 (1999). The Michigan Supreme Court does not deem *res judicata* as "a constitutional mandate that must be carefully construed to maintain its integrity, but only a tool created by the courts." *Id.* at 382. Indeed, the Michigan Court Rules do not even list *res judicata* as an affirmative defense. *See* Michigan Court Rule 2.111(F)(3)(a). Thus, Petitioner's "waiver" theory is highly doubtful.

Michigan law provides that neither parties nor their privies can relitigate a claim when the parties have fully litigated the claim and a final judgment has resulted. *Moore v. Wicks*, 184 Mich. App. 517, 520, 458 N.W.2d 653, 654 (1990). In the instant case, Petitioner raised the issue of *res judicata*, contending that the settlement agreement reached after Judge Porter's Order, which Petitioner alleged was contrary to the Order, "nullified" Judge Porter's Order. *See* Plaintiff-Appellant's Brief on Appeal, p. 23. The Michigan Court of Appeals considered the argument and reached the opposite conclusion that the prior settlement agreements were never approved or signed by the court, and therefore had no *res judicata* effect (Petition Appendix, p. 2, fn. 1). Naturally following its conclusion on the settlement agreements, the court found it "abundantly clear" that Judge Porter's Order continued to have *res judicata* effect. Under these circumstances, the court properly affirmed the lower court's decision on alternative ground of *res judicata* without reaching the issue whether post-production costs were deductible from royalties.

Petitioner simply cannot credibly argue that the Michigan Court of Appeals' application of *res judicata* violated its right of due process and equal protection when Petitioner itself brought the 1983 Litigation to the court's attention. Moreover, even if Petitioner had not brought the 1983 Litigation to the court's attention, Petitioner and its

attorney's knowledge of the 1983 Litigation, which involved the same issues as in the present case, placed Petitioner on constructive notice that the issue would likely arise in the course of the present case. Thus, this case is a far cry from the Petitioner's example where a person was imprisoned on charges of which he was never informed (Petition, p. 16).

The Michigan Court of Appeals has repeatedly held that it may address legal issues not addressed by the trial court if all necessary facts have been presented to it. *See County of Saginaw v. John Sexton Corp. of Mich.*, 232 Mich. App. 202, 224, 591 N.W.2d 52, 62 (1998); *Miller v. Inglis*, 223 Mich. App. 159, 168, 567 N.W.2d 253, 257 (1997); *Brown v. Drake-Willock International, Ltd.*, 209 Mich. App. 136, 146, 530 N.W.2d 510, 515 (1997). Under Michigan Court Rule 7.216(a)(7), the Michigan Court of Appeals may "enter any judgment or order or grant further or different relief as the case may require." Thus, the court's decision to affirm the lower court on principles of *res judicata* was quite in line with established procedural rules in Michigan.

This Court's discretionary jurisdiction is not for intellectual and scholarly debate, nor for the benefit of the particular litigants. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S. Ct. 614, 616, 99 L. Ed. 897 (1955) (citing *Magnum Import Co. v. Coty*, 262 U.S. 159, 163, 43 S. Ct. 531, 532, 67 L. Ed. 922 (1923)). This Court has the duty to avoid decisions of constitutional issues unless avoidance becomes evasion. *Id.* Here, Petitioner's due process and equal protection arguments are meritless, and this Court should refuse to entertain the Petition.

Finally, Petitioner's "burden shifting" contention also has no merit (Petition, p. 17). While it is true that a defendant bears the *evidentiary* burden to establish its defense, the Michigan Court of Appeals was in no manner shifting any evidentiary burden to Petitioner. Rather, the court was merely allowing Petitioner to give its *legal opinion* on the application of *res judicata*. Ironically, having been given this opportunity, much of the Petition is devoted to complaining that Petitioner did not have the opportunity to address the *res judicata* issue. Because Petitioner's "equal protection" claim depends entirely on this argument, Petitioner has absolutely failed to make a cognizable argument for violation of the Equal Protection Clause.

The Michigan Court of Appeals' application of *res judicata* was a proper alternative ground for affirming the lower court's decision. Petitioner's dragging of Respondent up to the United States Supreme Court, on the other hand, could be seen as vexatious abuse of the judicial system when Petitioner lost its argument in the state court and then claimed deprivation of the opportunity to be heard on that argument. *Arguendo*, even if there were any procedural irregularities in the instant case, they fall far short of any constitutional magnitude that would warrant this Court exercising its discretionary power of certiorari.

III. CONCLUSION

This Court grants certiorari for "compelling reasons" (Rule 10). The Petition cites no compelling reason for the Court to grant certiorari in this case. Essentially, the Petition merely reiterates its dissatisfaction with lower state court rulings without showing any legitimate federal constitutional issue. For all the reasons discussed above,

this Supreme Court should deny the petition for certiorari, and allow the orders of all the Michigan courts to stand.

Respectfully submitted,

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